IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-869

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, JOINT COUNCIL OF TEAMSTERS No. 38, and GEORGE LABRASCA,

*Petitioners,*

vs.

KENNETH W. SHERROD,

*Respondent.*

## Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

BEESON, TAYER, KOVACH & SILBERT
DUANE B. BEESON, ESQ.,
PATRICK J. SZYMANSKI, ESQ.
100 Bush Street, Suite 1500
San Francisco, Calif. 94104
Tel.: (415) 986-4060
*Attorneys for Petitioners*

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petitioners Chauffeurs, Teamsters and Helpers Local 150, Joint Council of Teamsters No. 38, and George La-Brasca, petition for a Writ of Certiorari to review the judgment of the Court of Appeal of the State of California in and for the Third Appellate District in the above-entitled case.

### OPINIONS BELOW

The opinion of the Court of Appeal of the State of California for the Third Appellate District, hereafter called the District Court of Appeal, is not officially reported. It is reprinted in Appendix A to this Petition.

The Supreme Court of California denied a Petition for Hearing in an order without opinion.

## JURISDICTION

The decision of the District Court of Appeal affirming the trial court's judgment following a jury verdict was issued on July 9, 1979. A timely Petition for Hearing was thereafter filed in the Supreme Court of California. The Petition for Hearing was denied without opinion on September 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

## QUESTIONS PRESENTED

1. Whether the principles of federal preemption in labor law, as stated in *Farmer v. Carpenters Local 25,* 430 U.S. 290 (1977), forbid a state court award of general and punitive damages for the tort of intentional infliction of emotional distress based solely on union interference with employment and expulsion from union membership to discourage active participation in union affairs.

2. Whether the award of punitive damages for violation of the duty of fair representation of a union member conflicts with the decision -of this Court in *IBEW v. Foust,* ..... U.S. ....., 60 L. Ed. 2d 698 (May 29, 1979).

## STATUTORY PROVISIONS

The questions presented arise in the context of the comprehensive regulation of labor union activity contained in the National Labor Relations Act, as amended 29 U.S.C. Sections 151, *et seq.* The provisions of that Act which have the most significant bearing on the questions are the following:



Section 1. * * *

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

* * * * *

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

## STATEMENT OF THE CASE

Respondent, an individual who was a member of Petitioner Local 150, presented two claims to the jury: (1) that by causing his discharge from employment, and by refusing to arbitrate his grievance based on the discharge, Petitioner violated the duty of fair representation imposed by the National Labor Relations Act; and (2) that Petitioners were guilty of intentionally causing respondent emotional distress in causing his discharge from employment and his expulsion from union membership. The underlying facts which the jury could have found in favor of respondent to support his claims are summarized below.

### A. The Facts

Petitioner Local 150 is a labor organization affiliated with the International Brotherhood of Teamsters and is located in the Sacramento, California area. During the events in



this case its chief executive officer was Secretary-Treasurer Carl Olsen. Petitioner George LaBrasca was a business representative of Local 150 who had been elected on a slate headed by Olsen (R.T. 39-40, 600).[1]

Petitioner Joint Council No. 38 is an organization comprised of local teamster unions in the Sacramento and San Joaquin valley areas of California. Delegates to Joint Council No. 38 are the officers of each affiliated local union. The Executive Board of the Joint Council is authorized to hear and determine appeals from local union decisions in disciplinary cases (Pl. Exh. 44, at pp. 84-88).

Respondent Kenneth Sherrod became a member of Local 150 in 1959, and in 1963 ran for one of the three trustee positions on the executive board of Local 150, finishing fourth and losing to the candidates backed by Olsen (R.T. 8-13). Sherrod attended membership meetings and frequently debated issues with the Union's leadership; he was often ruled out of order by Olsen (R.T. 749, 1009-1011).

Sherrod worked in the construction industry, and obtained employment out of Local 150's hiring hall. In June, 1965, Sherrod was dispatched from the hiring hall to Kuckenberg Construction Company as a water truck driver. While on the job, he made a number of complaints to the Company about the safety of equipment and about violations of the collective bargaining agreement (R.T. 21, 22, 24, 25, 301).

In July 1965, Business Representative LaBrasca talked to the superintendent of Kuckenberg about having Sherrod removed from his job (R.T. 634-635, 638-639). LaBrasca described Sherrod as a troublemaker who wanted to run

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1. References to R.T. are to the reporter's transcript of the proceedings at trial; C.T. references are to the clerk's transcript of pleadings; and Pl. Exh. and Def. Exh. references are to the exhibits submitted by respondent Sherrod and the Petitioners at trial.

against him in the next election. LaBrasca said Sherrod would probably win and suggested that the superintendent lay off Sherrod on the pretext that there was not enough work for him (R.T. 630-639). LaBrasca told another member of Local 150 to remain available to work at the Kuckenberg job because there would be a layoff there "any day" (R.T. 42). Kuckenberg called the hiring hall that same day and asked for another water truck driver to start the following Monday, July 26 (R.T. 829-830). In these circumstances, the union customarily redispatched the laid off worker, but LaBrasca instructed the Local 150 dispatcher to forget about Sherrod and sent the next person on the hiring hall list (R.T. 829-830, 833). The next driver worked on the job until the fall of 1965 (R.T. 603, 605).

On July 23, 1965, Sherrod filed a grievance against the Kuckenberg Construction Company, alleging that the Company had discharged him because of his complaints concerning safety and improper assignment of work (R.T. 49-51). Under the grievance procedure, Sherrod's grievance was referred to the Board of Adjustment, a joint labor-management committee composed of two management and two union representatives (R.T. 52). The Board deadlocked and Secretary-Treasurer Olsen, exercising his authority under the Local 150 Bylaws and acting with the advice of counsel, declined to take Sherrod's grievance to arbitration (R.T. 334, 352).

On December 13, 1965, Sherrod met with George Mock, Vice President of the International Brotherhood of Teamsters, and Local 150 Secretary-Treasurer Olsen at the International's office in Sacramento. Sherrod asked Mock and Olsen to investigate his discharge from Kuckenberg and see whether LaBrasca was involved. Sherrod was never informed that any investigation had been conducted (R.T. 58-60, 62, 64-67).



On the same day, Sherrod filed internal union charges against Secretary-Treasurer Olsen, challenging Olsen's refusal to take Sherrod's grievance to arbitration. The charge was ultimately scheduled for hearing on April 18, 1966, before a Local 150 Trial Board (R.T. 69-70). The hearing was held in Sherrod's absence, the Trial Board denying his request for a postponement because of a conflicting meeting Sherrod had scheduled with National Labor Relations Board personnel. The Trial Board found against Sherrod and commended Olsen for not wasting the Local's funds by taking Sherrod's grievance to arbitration (R.T. 69-72). Sherrod appealed this decision to Joint Council No. 38, which affirmed (R.T. 75).

In February 1966, Sherrod filed a charge against Local 150 with the National Labor Relations Board. Sherrod alleged that Local 150 had violated that National Labor Relations Act both by requesting his discharge from Kuckenberg and by failing to take his grievance to arbitration (Def. Exh. K). After investigating Sherrod's charge, the Labor Board's Regional Director refused to issue a complaint. The Regional Director found (1) that the investigation "did not establish that the Union's refusal to process your grievance through arbitration was based on considerations which are violations of the Act," and (2) that any complaint regarding Sherrod's discharge was barred because the discharge occurred more than six months before the charge was filed (Def. Exh. L). The dismissal was affirmed on appeal to the office of the Board's General Counsel (Def. Exh. N).[2]

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2. The communication advising Sherrod of the denial of his appeal, explained the decision as follows (Def. Exh. N):

> "Under all of the circumstances, including the evidence that the Union had processed your grievance and obtained a proposed $900 settlement which you rejected, and the evidence

Eight days after Sherrod filed the Labor Board charge, Petitioner LaBrasca filed an internal union charge against Sherrod. The charge alleged that Sherrod had falsely accused LaBrasca of collusion with Kuckenberg Consruction Company in obtaining the discharge of Sherrod (R.T. 615). Another business representative had advised LaBrasca to file the charges, indicating that Olsen had wanted them filed (R.T. 618-619). On March 10, 1966, Sherrod filed a counter charge against LaBrasca, expressly accusing LaBrasca of involvement in the termination of his employment (R.T. 76).

The two charges were scheduled for hearing before a Trial Board substantially similar in makeup to the Board which had nine days earlier upheld Olsen's refusal to take Sherrod's grievance to arbitration. Sherrod requested a continuance of the hearing on two occasions, and was granted the first but not the second. Sherrod was granted an extension of time to submit post hearing written statements of witnesses who could not attend the hearing, but failed to meet the deadline (R.T. 83-86). He submitted two of the three statements on May 24, 1966, but learned a day later that a decision had been made by the Trial Board on May 18. The decision found LaBrasca not guilty and Sherrod guilty, and Sherrod was expelled from Local 150 (R.T. 87-88).

Sherrod appealed his expulsion to Joint Council No. 38. The Joint Council Executive Board heard Sherrod's case *de novo* on July 25, 1966 (Def. Exh. W). In a written decision, the Board upheld Sherrod's suspension (Pl. Exh. 27).

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that the Union had acted on the advice of its counsel that the case would be lost if it went to arbitration, insufficient basis existed for a finding that the Union's decision to drop the grievance was attributable to any consideration other than its good faith belief that it could not prevail before an arbitrator."



The Board agreed with Olsen's decision not to arbitrate Sherrod's grievance, relying in part on the Labor Board's dismissal of the unfair labor practice charge.

Although the decision of the Executive Board of Joint Council No. 38 indicated all members concurred, one of the members neither participated in the Board's deliberations nor voted on the case. Prior to issuance of the decision, the Board wrote this member that it would be assumed he concurred in the decision unless he responded by a given date, and he did not respond (R.T. 467-474, 890-899).

Sherrod appealed his expulsion to the International Brotherhood of Teamsters, and the case was heard before a special three member trial panel. The panel thereafter recommended that the expulsion be sustained, but the International Executive Board decided to take no further action on the recommendation when, in the interim, Sherrod was reinstated to membership in Local 150 in April 1968 (R.T. 118, 116).

There is evidence that on two occasions in 1966 Sherrod was denied employment because a business agent of Local 150 had interceded in job offers (R.T. 132-135, 127-132). He was dispatched, however, from Local 150's hiring hall to short term jobs during 1966, and on one occasion worked for three months for the same employer (R.T. 204-206). Sherrod had steady employment when the complaint in this case was filed.

### B. Proceeding Below

Sherrod filed this action in May 1967 in the California Superior Court for Sacramento County. Trial before a jury was conducted on fourteen days in March and April 1973. As pointed out by the District Court of Appeal, there were originally five causes of action pleaded, but the case was

submitted to the jury upon instructions which presented two claims: one for infliction of emotional distress, and the other based upon a violation of the duty of fair representation (App.A, p. 19). The relevant jury instructions are quoted in the decision of the District Court of Appeal (App. A, pp. 19-22). The jury awarded Sherrod $50,000.00 in general damages, and $125,000.00 in punitive damages against the three petitioners, jointly and severally. Petitioner's motion for a new trial was denied on June 14, 1973 (App.E).

Notice of appeal to the District Court of Appeal was timely filed on June 27, 1973, but decision was not issued by that Court until July 9, 1979. The Court upheld the verdict rendered against defendants, finding that the case had gone "to the jury on a valid legal theory without error" (App. A, p. 34). In particular, the Court held that no part of plaintiff's cause of action was preempted by federal labor law, that the jury was properly allowed to award punitive damages, and that the evidence was sufficient to support a finding that defendants had committed the tort of intentional infliction of emotional distress (ibid.)

### C. Presentation of the Federal Question in Proceeding Below

The question of whether the state courts had jurisdiction to adjudicate this case was initially raised by Demurrer to the original complaint (C.T. p. 13, attached to this Petition as Appendix B). The same question was raised again by Demurrer to the First Amended Complaint (C.T. 47, attached to this Petition as Appendix C). The trial court sustained the first demurrer on unrelated grounds, with leave to amend, and denied the demurrer to the First Amended Complaint, without opinion (C.T. 59, attached to this Petition as Appendix D). Petitioners again raised the federal question in support of a motion for a new trial,



and the trial court rejected the contention in a short written decision (C.T. 228, attached to this Petition as Appendix E). As shown in the opinion of the District Court of Appeal, the question of federal preemption was the principal issue presented and decided on appeal.

The question of whether punitive damages could properly be awarded was raised by proposed jury instructions, but not on the ground that punitive damages are unavailable under federal law principles governing suits for unfair representation. The latter question was presented on motion for a new trial, and was rejected by the trial judge.[3] Although the question of punitive damages was presented to and dealt with by the District Court of Appeal, the briefs did not discuss this Court's decision in *IBEW v. Foust,* ..... U.S. ....., 60 L. Ed. 2d 698, which was decided on May 29, 1979. The latter decision was not called to the attention of the District Court of Appeal.

## REASONS FOR GRANTING THE PETITION

1. In *Farmer v. Carpenters Local 25,* 430 U.S. 290 (1977), this Court defined an area of conduct—"outrageous conduct causing the plaintiff to sustain mental distress" (430 U.S. at 304)—for which state courts mights award damages even though it occurred in the context of labor activities which are exclusively regulated by federal labor law. The decision recognizes that there exists "some risk that the state cause of action for infliction of emotional distress will touch an area of primary federal concern," and emphasizes "that concurrent state court jurisdiction

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3. Pages 4 and 5 of Petitioners' memorandum in support of the motion for a new trial, where the question of punitive damages is discussed, are attached to this Petition as Appendix F. The trial court's denial of the motion for new trial is attached to this Petition as Appendix E.

cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." 430 U.S. at 303, 305. The balance struck by the Court between the interest of the state in administering tort law and the interest in maintaining the exclusiveness of federal regulation of labor union activity, is a delicate one. Continuing supervision by this Court in the development of the law in this area is appropriate and necessary if the exception to the doctrine of federal preemption recognized in *Farmer* is not to swallow the rule.

In the instant case, as we show more fully *infra,* the state judgment appears to rest exclusively on labor law considerations which the decision in *Farmer* holds to be impermissible in state court adjudication. This is accordingly a proper case to clarify the line between state and federal jurisdiction in the sensitive area dealt with in *Farmer,* and to prevent the wrongful encroachment of state tort law into the federally preempted area.

The second question presented—whether the award of punitive damages can stand—involves a simple application of the ruling in *IBEW v. Foust,* ..... U.S. ....., 60 L. Ed. 2d 698 (May 29, 1979), that punitive damages may not be granted for violations of a union's duty of fair representation. The decision of the District Court of Appeal does not refer to *Foust,* and it may be assumed that the Court was unaware of this Court's ruling, which was issued a little more than one month prior to the decision below. The upshot is that the decision below appears to be in direct conflict with this Court's holding in *Foust,* and it is therefore appropriate to correct it. We add that the sizeable award of punitive damages made in this case constitutes the kind of hardship of which this Court has taken note both in *Foust* and *Farmer.* This factor also makes it appropriate to grant the Petition.



2. The evidence adduced by Sherrod in support of his claims relates to five "wrongs" suffered by him: (1) his discharge from his job at Kuckenberg Construction Company, (2) Local 150's refusal to arbitrate his grievance, (3) his expulsion from membership by Local 150, (4) the failure of Joint Council No. 38 to restore his membership, and (5) interference by Local 150 business agents in his job opportunities. Each of these wrongs is governed in whole or in part by federal labor law.

The first "wrong" is a breach of Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(2), because LaBrasca, acting as an agent of Local 150, caused Sherrod's discharge because of Sherrod's activities within the Union. See *Radio Officers' Union v. NLRB,* 347 U.S. 17 (1954). It may also be a breach of Local 150's duty of fair representation because Local 150's action in having Sherrod discharged was discriminatory and in bad faith. See *Vaca v. Sipes,* 386 U.S. 171 (1967). In these circumstances Sherrod could either file a charge with the Labor Board (which he did, although too late) or sue Local 150 in either state or federal court. *Miranda Fuel Co.,* 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d. Cir. 1963) (Labor Board charge); *Syres v. Oil Workers Local 23,* 350 U.S. 892 (1955) (federal court); *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944) (state court). In either case Sherrod would be limited to a remedy of back pay. See *IBEW v. Foust, supra; Williams v. Pacific Maritime Ass'n,* 421 F.2d 1287 (9th Cir. 1970); *St. Clair v. Local 515, Teamsters,* 422 F.2d 128 (6th Cir. 1969) (back pay).

The second wrong gives rise to a classic unfair representation case. See *Vaca v. Sipes,* 386 U.S. 171 (1967) (failure to arbitrate grievance). Such a claim arises under the National Labor Relations Act.

The third wrong is a breach by Local 150 of the membership contract between it and Sherrod. See *International Ass'n of Machinists v. Gonzales,* 365 U.S. 617 (1958); *Dingwell v. Amalgamated Street Railway Employees,* 4 Cal. App. 565 (1906). Despite contrary language in *Gonzales*, 356 U.S. at 620-623, it is now clear that under federal labor law damages for loss of employment resulting from lack of union membership may not be awarded as the result of a suit for breach of the membership contract. *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971); *Local 100, Journeymen v. Borden,* 373 U.S. 690 (1963). These cases clearly establish the proposition that interference with employment on the basis of union membership is subject to the exclusive jurisdiction of the Labor Board. Indeed Sherrod went to the Labor Board on two occasions in 1966 for claims of just this sort. Nor, under state law, are punitive damages recoverable for breach of the membership contract. *Crogan v. Metz,* 47 Cal. 2d 398 (1956); *Fletcher v. Western Nat'l Life Ins. Co.,* 10 Cal. App. 3d 376, 400 (1970).

The fourth wrong states an identical cause of action against Joint Council 38 for breaching its membership contract by failing to reinstate Sherrod to membership. The same limitations on damages apply, and Sherrod could on this claim recover neither punitive damages nor damages for lost employment against Joint Council 38 in a state court suit.

The fifth wrong is within the exclusive jurisdiction of the Labor Board because it is interference by Local 150 in Sherrod's employment contrary to Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(2). *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959).



From the foregoing, it is apparent that the incidents which constitute the basis of the infliction of emotional distress are employment discrimination, bad faith in the handling of a grievance, and wrongful expulsion from membership. These are considerations which this Court has held in *Farmer v. Carpenters Local 25, supra,* cannot be the ingredients of a judgment for the tort of intentional infliction of emotional distress. As summarized in *Farmer,* 430 U.S. at 305 (emphasis added; footnote omitted):

> "[W]e reiterate that state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state court jurisdiction. It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state court jurisdiction can be permitted. *Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself."*

Sherrod offered no evidence at trial that the mistreatment of which he complains was administered in an "abusive manner." The record shows no examples of personal abuse other than the events themselves. Nor can the five alleged wrongs be considered in combination to form the basis of the kind of outrageous conduct or of a "partic-

ularly abusive manner" of administering union action over which states may assert jurisdiction. To permit the tort found by the jury to stand because of a concentration of several individual incidents, each of which is totally regulated by federal labor law, presents as much or more danger of upsetting the balance struck in *Farmer* as does basing the tort on any one incident.

In sum, the decision below conflicts with this Court's ruling in *Farmer,* and constitutes the kind of interference with federal regulatory scheme which cannot be permitted to stand.

3. The verdict returned in this case does not specify that puntive damages were awarded for violation of the duty of fair representation, but neither does it specify that such damages were based solely on the infliction of emotional distress. The jury instructions did not distinguish between the evidence which would be separately relevant to each of the two claims. The instructions suffer from the same imprecision and confusion which prompted this Court's criticism of the jury instructions in *Farmer, supra,* at 306-307. The consequence is that the jury was allowed to award punitive damages based on evidence of a breach of the duty of fair representation. This result is in direct conflict with *IBEW v. Foust,* ..... U.S. ....., 60 L. Ed. 2d 698 (May 29, 1979).



## CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

December 1979.

BEESON, TAYER, KOVACH & SILBERT
DUANE B. BEESON, ESQ.,
PATRICK J. SZYMANSKI, ESQ.
*Attorneys for Petitioners*

## *Appendix A*

*NOT TO BE PUBLISHED IN OFFICIAL REPORTS*

COPY

*In The Court of Appeal of the State of California*
*In and for the Third Appellate District*

(Sacramento)

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| KENNETH W. SHERROD,<br>Plaintiff and Respondent,<br>v.<br>CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 150, JOINT COUNCIL OF TEAMSTERS No. 38 and GEORGE LABRASCA,<br>Defendants and Appellants. | 3 Civ. 14347<br>(Super.Ct. No. 175600)<br>July 9, 1979 |

Plaintiff is a construction Teamster. Until his expulsion in May 1966 he was a member of Chauffeurs, Teamsters and Helpers Local Union No. 150 (hereinafter Local 150 or Union), a defendant in this action. In June 1965 plaintiff was terminated from a construction job with Kuckenberg Construction Company (Kuckenberg) under circumstances which led him to believe he had grounds for a grievance against his erstwhile employer. The Union, however, refused to arbitrate his grievance, and the National Labor Relations Board (NLRB) declined jurisdiction of plaintiff's charges against the Union based upon that refusal. Subsequently, plaintiff was expelled from the Union after a Union trial board sustained charges that he had falsely accused defendant George LaBrasca, a Union business agent, of arranging the Kuckenberg discharge.

No longer a Union member, plaintiff was disadvantaged in securing employment. His wages were reduced from their former level and on occasion he was financially impoverished.

In May 1967 plaintiff commenced this action for damages against Local 150, Joint Council of Teamsters No. 38 (Council), LaBrasca and others (against whom judgment was not taken). His first amended complaint, on which he proceeded to trial, sets forth five counts or causes of action, which he designates and refers to as wrongful expulsion, refusal to restore to Union membership, wrongful interference with the right to work, prevention of exercise of the right to be a candidate for Union office (business agent), and conspiracy to do all the foregoing. The detailed factual allegations (which are substantially included in our summary of the evidence hereinafter set forth) are sufficient to support the tort of intentional infliction of emotional distress, even though none of the counts are so designated. Compensatory and punitive damages were sought. A jury awarded plaintiff $50,000 compensatory and $125,000 punitive damages. Defendants appeal, contending principally that state court jurisdiction over the controversy is preempted by the National Labor Relations Act (NLRA).

Despite the five causes of action pleaded, the case was submitted to the jury primarily on an emotional distress theory. Arguably, it also went to the jury on the theory of the Union's duty of fair representation. (Vaca v. Sipes (1967) 386 U.S. 171, 177; Miranda Fuel Company, Inc., 140 N.L.R.B. 181 (1962).) We here set forth all the substantive law instructions given to the jury:

1.[1] "In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts

1. The numbering is our own for purposes of easy reference throughout this opinion.



necessary to prove the following issues: 1. That the defendants or some of them intentionally by outrageous conduct inflicted upon plaintiff severe emotional distress. 2. That said conduct proximately caused injury and damage to plaintiff. 3. The nature and extent of said injury and damage and the amount thereof."

2. "Before a plaintiff may recover for the infliction of severe emotional distress, the cause of it must proximately result from intentional outrageous conduct on the part of the defendants. Outrageous conduct is that behavior which is completely unreasonable and without justification in the handling of business or personal relationships."

3. "Two of the factors which may be considered by you in determining the severity of the plaintiff's emotional distress, if any, is the duration the plaintiff's shame, humiliation, worry and anxiety persisted and the intensity of it. 'Severe' means, in this context, substantial or enduring, as distinguished from trivial or transitory. It must be of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it. Liability does not extend to mere insults, indignities, annoyances, petty oppressions or trivialities [*sic*]."

4. " 'Severe emotional distress' as will permit you to find for a plaintiff, must in fact exist and it must be severe. It may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry."

5. "A breach of the union's duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Mere negligence or bad judgment on the part of the union or its representatives does not constitute a breach of duty of fair representation."

job. He later told Waddell to remain available to work at the Kuckenberg job because there would be a layoff there "any day."

On July 22, 1965, plaintiff was laid off due to a reduction in force. He visited the job site a few days later and discovered that all water trucks were operating and another teamster had been hired in his place. It was the Union's custom in reduction-in-force circumstances to redispatch to the same job any person laid off if a person of the same skill was again needed within 30 days. Contrary to that custom, LaBrasca instructed the Local 150 dispatcher not to send plaintiff back to the job when Kuckenberg called for another water truck driver.

During the short time plaintiff was employed by Kuckenberg, he lodged several complaints with the foreman and job superintendent with reference to misassignment of work and equipment safety violations. Believing he had lost his job due to these complaints, plaintiff filed a grievance to get his job back. The matter was considered by a grievance committee comprised of two persons representing the Union and two persons representing the employer. The committee deadlocked over whether plaintiff should be restored to his job.

Plaintiff's next remedy was arbitration. The two Union members of the grievance committee voted to submit the dispute to arbitration. Plaintiff requested of Carl Olsen, Local 150's secretary-treasurer and chief executive officer, that the matter be submitted to arbitration but Olsen refused.

Plaintiff filed internal Union charges agaist Secretary-Treasurer Olsen to challenge his refusal to arbitrate. A meeting of the Union trial board was set for April 18 to consider the charges. Plaintiff notified the trial board that he would be unable to appear because he was preparing for



a National Labor Relations Board trial the following morning. The Union trial was held in his absence with the trial board finding against plaintiff and in favor of Secretary-Treasurer Olsen.

Thereafter one of the Union members on the grievance committee informed plaintiff that he had been told by a Union official that Business Agent LaBrasca had precipitated plaintiff's discharge. Plaintiff then went to International Teamster headquarters and talked to Vice-President George Mock. Plaintiff told Mock he was informed that LaBrasca was illegally involved with his discharge from Kuckenberg and asked him to ascertain the truth of the matter. To plaintiff's knowledge, no action was ever taken.

Plaintiff filed an unfair labor practice charge with the NLRB based upon the Union's failure to arbitrate his discharge by Kuckenberg, alleging that Olsen and LaBrasca had conspired to engineer his discharge by Kuckenberg. The NLRB refused jurisdiction after being informed by counsel for the Union that arbitration had been denied because in his legal opinion the Union had a less than even chance to win. Eight days after plaintiff filed the NLRB proceeding, LaBrasca filed internal Union charges against plaintiff citing him for accusing LaBrasca of illegally obtaining plaintiff's discharge. Jack Grady, another union business agent, instructed LaBrasca to file the charges, indicating that Olsen had directed the move. Plaintiff responded by filing internal Union charges against LaBrasca alleging LaBrasca's involvement in his discharge by Kuckenberg.

All charges were set for hearing before a Union trial board on April 27, 1966. LaBrasca was unable to attend and so informed the trial board. The hearing was continued despite plaintiff's objection and the further fact that under the Union's constitution, failure of the charging party to

appear in person or present evidence before a trial or appellate body on the date set for trial mandates dismissal of the charges and precludes retrial of the same charges.

The matter was tried on May 6. A crucial witness for plaintiff had appeared on the originally scheduled trial date but did not appear on May 6. Plaintiff asked for a postponement until that witness could attend and also to secure the testimony of another witness. The trial board denied a continuance, but offered plaintiff until May 16 to file with the board his evidence. Plaintiff was unable to obtain the witness' statements by the 16th and by letter requested additional time until 5 p.m., May 24, 1966. The statements were delivered to the Union's office before May 24. However, the Union notified plaintiff by letter dated May 23 that the trial board had exonerated LaBrasca and found plaintiff guilty upon LaBrasca's charges and expelled him from the Union. The Union trial board had met and reached this decision on May 18.

Plaintiff appealed the expulsion decision to defendant Joint Council 38. A de novo hearing was held on July 25, 1966, after which the Council upheld plaintiff's expulsion. Secretary-Treasurer Olsen normally sat as a Council member but on this occasion was replaced by Benny Juarez. The evidence was not discussed by the Council in Juarez' presence nor was he given the opportunity to vote on plaintiff's guilt or innocence. Juarez did not sign the decision expelling plaintiff; moreover, it was not presented to him for his signature even though it purported to be signed by him.

Juarez received a letter from the Joint Council informing him that it would be assumed he would concur with the decision unless he responded by a date which had already passed. Juarez did not know what penalty was imposed until several months later when he talked with LaBrasca



who thanked him, stating that it was "either him [plaintiff] or I".

Plaintiff appealed his expulsion to the International Union. Their hearing was held but no decision was ever rendered because in the interim plaintiff was reinstated by the Union. On one occasion LaBrasca stated that plaintiff was reinstated because in the opinion of the leadership he would prevail in a court action.

After his expulsion plaintiff worked intermittently for both Union and nonunion employers. The irregular nature of his work is explained in part by its seasonal nature. Plaintiff drove a water truck and the normal annual period of such employment is May 1 to November 1. He obtained some employment under the "five-year letter" provision whereby a person with a minimum of 240 hours work in each of the preceding five years could arrange employment without first being on the Union dispatch list. Plaintiff also signed the "out-of-work" list at the hiring hall each month, as did unemployed Union members.

The evidence disclosed an effort by Union officials to limit plaintiff's job opportunities. On one occasion he sought employment with the Wendt Construction Company which was building an airport near his home. Although told that a job would become available, he was not hired. He ascertained that a Union business agent had told an employer not to hire him. Plaintiff filed unfair labor practice charges against the local with the NLRB and was awarded three days' back pay. Plaintiff also sought employment with the McKeown Transportation Company, but was told by a McKeown representative that a Union business agent had told the company not to hire him. He filed charges against the Union with the NLRB which were dismissed because they had not been filed within the statutory period.

Plaintiff's earnings suggest a loss in employment opportunities during his expulsion. In 1964 he earned $8,566; in 1965 he earned $3,120; in 1966 — $4,174; in 1967 — $5,868; and in 1968 — $7,154. During that period it became necessary for plaintiff to refinance his house in order to maintain the mortgage payments. His wife returned to work in order to obtain insurance. Although plaintiff was afraid that all his family medical bills would not be paid by the Teamster insurance, those fears proved largely unfounded. However, plaintiff did have to request a reduction in the adoption fee for the child which he and his wife adopted in 1966. It is conceded that there could well be a relationship between the small volume of the work available during the winter of 1966 and 1967 and the fact that plaintiff was not obtaining work.

Plaintiff testified that he was emotionally affected by his dismissal from the Union. He felt shame and humiliation, and thought that his former Union colleagues were no longer friendly toward him. Persons were no longer as helpful in assisting him to find work. Companies were aware of plaintiff's expulsion and were not as willing to hire him. Some Union members thought that plaintiff should not be allowed to work since he was no longer a Union member. Plaintiff felt shame and humiliation when asking about employment from persons he knew. He always was concerned that the fact of his expulsion would be brought up. He was aware on many occasions that the fact of his expulsion was known to persons with whom he was talking. He found that he was unable to sleep as before and would have to get up at night.

B. Preemption

The United States Supreme Court has on frequent occasions described the preemption doctrine in the context of



the federal labor law: "The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. . . . [¶] The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. . . .

"[N]othing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law. Nor would an approach suffice that sought merely to avoid disparity in the content of proscriptive behavior rules. . . . Congress in establishing overriding federal supervision of labor law 'did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite

as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' " (Fn. omitted; Motor Coach Employees v. Lockridge (1971) 403 U.S. 274 [29 L.Ed.2d 473, 482-483].)

"The doctrine of pre-emption in labor law has been shaped primarily by two competing interests. On the one hand . . . [the Supreme Court] has recognized that 'the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting "rules of law, of remedy, and of administration" cannot be permitted to operate.' [Citations.] On the other hand, because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the [Supreme] Court has been unwilling to 'declare pre-empted all local regulations that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . .' [Citation.] Judicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth in [San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236 [3 L.Ed.2d 775] . . .:

" 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.' [3 L.Ed.2d at p. 782.]

"But the same considerations that underlie the Garmon rule have led the [Supreme Court] to recognize exceptions



in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' " (Fns. omitted; Farmer v. Carpenters (1977) 430 U.S. 290 [51 L.Ed.2d 338, 347-348].)

The "peripheral concern" exception in *Garmon* resulted from the Supreme Court decision in International Asso. Machinists v. Gonzales (1958) 356 U.S. 617 [2 L.Ed.2d 1018], wherein the court allowed an expelled union member to sue his union for reinstatement and wage loss. The court concluded that the matter was not pre-empted because the federal labor law had not undertaken to protect union members against arbitrary union conduct and the state court remedy should be utilized to "fill up" the limited remedy available to the discharged member under the NLRA. The effect of *Gonzales*, which seemingly permits state court jurisdiction of any suit by a member against his union was blunted by two subsequent cases, Association of Journeymen v. Borden (1963) 373 U.S. 690 [10 L.Ed.2d 638], and Iron Workers Union v. Perko (1963) 373 U.S. 701 [10 L.Ed.2d 646]. In both *Perko* and *Borden*, the plaintiffs sought damages for their unions' interference with their right to seek employment opportunities. The Supreme Court stressed that the crux of the lawsuits was not directed at internal union matters, but rather, at alleged interference with existing or anticipated employment relations which arguably comes within the Board's jurisdiction. (See *Borden*, supra, 373 U.S. at p. 694, and *Perko*, supra, at p.

705.) The court noted further that since plaintiffs were not seeking reinstatement, there was "no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." (*Perko,* supra, 373 U.S. at p. 705.)

Nonetheless, in certain instances the nature of the conduct to be regulated is of paramount local concern and will not be preempted without compelling congressional direction. Cases falling within this exception have involved tort actions for the recovery of compensatory and punitive damages. (International Union, U.A., A.& A.I.W. v. Russell (1958) 356 U.S. 634 [2 L.Ed.2d 1030] (mass picketing and threats of violence); United Constr. W. v. Laburnum Constr. Corp. (1954) 347 U.S. 656 [98 L.Ed. 1025] (mass picketing, threats of violence, loss of business); Linn v. United Plant Guard Workers (1966) 383 U.S. 53 [15 L.Ed. 2d 582] (malicious libel); Farmer v. Carpenters, supra, 430 U.S. 290 [51 L.Ed.2d 338] (intentional infliction of emotional distress).) The cases have not been subjected to the preemption doctrine because the underlying conduct is not protected by the act, the state has an overriding interest in protecting its citizens against the conduct complained of and the matters at issue in the state suit would not be relevant to the Board's determinations and vice versa (*Farmer*, supra, [51 L.Ed.2d at p. 349]).

In Farmer v. Carpenters, supra, plaintiff's decedent was the victim of employment discrimination allegedly resulting from internal political struggles accompanied by personal abuse and harrassment. His action for damages was couched in several counts. He sought recovery for emotional distress and in other counts, for employment discrimination, breach of the collective bargaining agreement and his membership contract. A demurrer was sustained to



all but the emotional distress count upon which plaintiff proceeded to trial and was awarded $7,500 actual and $175,000 punitive damages against the Union, the District Council, and the business agent. The award was reversed by the California Court of Appeal predicated upon its conclusion that *Garmon*, supra, *Perko*, supra, and *Borden*, supra, controlled in that the essence of the action involved employment relations. The Supreme Court focused upon the elements of the cause of action for intentional infliction of emotional distress and noted that the conduct embraced therein is not protected by the NLRA; that although in the context of the other allegations of discrimination and hiring hall referrals, the conduct might constitute unfair labor practice within the jurisdiction of the Board, the state has a substantial interest in protecting its citizens; and that the tort aspects of the conduct could be litigated with minimal potential for interference with the federal labor law scheme. (*Farmer*, supra, 430 U.S. 290 [51 L.Ed.2d at pp. 351-352].)

The *Farmer* court concluded by cautioning that the doctrine of preemption must not be undermined by allowing union discrimination in employment opportunities itself to constitute the "outrageous" conduct upon which the state tort action is based. "It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." (430 U.S. 290 [51 L.Ed.2d at p. 353].) The court additionally emphasized that recovery could not

be predicated "on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts" and admonished the state trial courts of their duty to assure that damage awards are not excessive. ([*Id.*, at pp. 353-354].)

Evaluating this case under the foregoing principles and authorities, we observe immediately that it fits squarely within the confines of the state action permitted by the *Farmer* case. The case went to the jury on an emotional distress theory, as shown by instructions Nos. 1, 2, 3 and 4. The jury was limited to the requirement of *outrageous* conduct, as stressed by Farmer v. Carpenters, supra, 430 U.S. 290 [51 L.Ed.2d at p. 353]; it was not permitted to award damages for interference with plaintiff's employment opportunities (see Instr. No. 10, supra), as cautioned by *Farmer* (*ibid.*). It almost appears that the trial court foresaw the Supreme Court's decision in *Farmer*, for it structured its submission to the jury very much in accord therewith.

Instruction No. 5 deals with Local 150's duty of fair representation, an area also not preempted by the NLRA (see Vaca v. Sipes, supra, 386 U.S. 171 [17 L.Ed.2d 842]; Farmer v. Carpenters, supra, 430 U.S. 290 [51 L.Ed.2d at p. 348]; Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights* (1973) 51 Texas L.Rev. 1037, 1063). While that duty was placed before the jury, the latter was not, strictly speaking, authorized to find liability based upon it in view of the limitation of Instruction No. 1, but in any case recovery on that theory was certainly permissible.

Instructions Nos. 6, 7, 8 and 9 only furnished guidance to the jury; they did not permit it to award damages on any theory other than intentional infliction of emotional distress,



and possibly the duty of fair representation. Indeed these were limiting instructions generally more favorable to the defense than to the plaintiff.

Thus the case went to the jury on a valid legal theory without error. The preemption argument cannot be sustained.

C. Punitive Damages.

Defendants claim that the court erred in permitting the jury to consider and ultimately award punitive damages. The primary thrust of this argument is that punitive damages may not be awarded for breach of contract (Civ. Code, § 3294) and any duty breached by defendants is based upon contract.

As above noted, the case went to the jury on a tort theory, intentional infliction of emotional distress, for which punitive damages are not proscribed (Fletcher v. Western Natl. Life Ins. Co. (1970) 10 Cal.App.3d 376, 400-401). Civil Code section 3294 provides that ". . . where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." The evidence, as above summarized, supports the jury determination that the conduct of defendants was such as to justify a punitive damage award.

D. Sufficiency of Evidence.

Defendants claim that no defendant committed the tort of intentional infliction of emotional distress, arguing that there was no outrageous conduct, no intent, no severe or extreme distress, and no proximate cause. In effect this is a sufficiency of evidence argument upon which we need not dwell. As outlined above, the evidence was more than sufficient.

E. Compensatory Damages.

Next defendants claim that the evidence does not support the amount of $50,000 for compensatory damages. In general, the power of a reviewing court to declare excessive an award of damages exists only when it can be concluded from the entire record that the award was the result of passion or prejudice. (Horn v. Guaranty Chevrolet Motors (1969) 270 Cal.App.2d 477, 484.) All presumptions are in favor of the verdict and judgment. When the trial court has indicated its approval of an award by failing to reduce it, the reviewing court will hesitate to declare the amount excessive[2] (Finney v. Lockhart (1950) 35 Cal.2d 161, 164; Harris v. Lampert (1955) 131 Cal.App.2d 751, 752-753).

Herein, as the trial court stated, the evidence supporting the sizeable award of compensatory damages was adequate even though not overwhelming. Plaintiff testified as to his embarrassment and humiliation on repeated occasions; his extreme and protracted mental anguish, his difficulty in obtaining other work, his grave concern and worry over a long period of time and his severe apprehension. Further the jury was entitled to consider the numerous hearings which were required due to the defendants' conduct. The compensatory damage award must be sustained.

F. Punitive Damages.

We reject a similar challenge to the claimed excessiveness of the punitive damage award. Considering the evidence presented, the jury determination will not be disturbed. (See Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App.2d 735.)

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2. The trial court denied a new trial motion predicated on excessive damages.



G. Other Contentions.

Other contentions are made by defendants which we do not expressly discuss. They are included either directly or indirectly within our comments or lack sufficient merit to warrant individual treatment.

The judgment is affirmed.

PUGLIA, P. J.

We concur:

REGAN, J.

EVANS, J.

## *Appendix B*

FILED
Aug 8, 1969
W. N. Durley, Clerk
By H. Farmer
Deputy

LE PROHN & LE PROHN
315 Montgomery Street
San Francisco, California 94104
Telephone: 981-0430
Attorneys for Defendants

*Superior Court of the State of California*
*County of Sacramento*

Kenneth W. Sherrod,
Plaintiff,
v.
Chauffers, Teamsters, and Helpers, Local Union No. 150, of Sacramento, California, Joint Council of Teamsters No. 38, a Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Carl J. Olsen, George M. LaBrasca, Richard Henry, Howard Yaeger, Doe I, Doe II, Doe III, Doe IV, Doe V, Doe VI, Doe VII, Doe VIII, Doe IX, Doe X, Doe XI, Doe XII, Doe XIII, Doe XIV, Doe XV, Doe XVI, Doe XVII, Doe XVIII, Doe XIX, and Doe XX,
Defendants.

No. 175 600

DEMURRER TO COMPLAINT

I.

Defendants CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 150; JOINT COUNCIL OF TEAMSTERS NO. 38; CARL J. OLSEN; GEORGE M. LABRASCA, RICHARD HENRY and HOWARD



YAEGER demur to the First Cause of Action in the Complaint in this action on each of the following grounds:

(1) The Court has no jurisdiction of the subject matter of the First Cause of Action in that the subject matter of said cause of action has been preempted by federal labor law.

(2) The Court has no jurisdiction of the subject matter of this cause of action under the law of the State of California.

(3) The First Cause of Action does not state facts sufficient to constitute a cause of action against these demurring defendants or any of said defendants.

(4) The First Cause of Action is uncertain in that it cannot be ascertained therefrom:

(a) What is meant by the phrase "rights and privileges of such membership" as that phrase is used in paragraph VII, line 17, page 3 of the First Cause of Action;

(b) Whether the right to work under collective bargaining agreements alleged in paragraph VII, lines 18 and 19, page 3 of the First Cause of Action is a written or oral right of membership;

(c) Whether or not the hearings alleged in paragraph X, lines 13-16, page 4 of the First Cause of Action were hearings held on charges made against plaintiff by defendant LABRASCA;

(d) Whether or not plaintiff received notice of the hearings alleged at paragraph X, lines 13-16, page 4 of the First Cause of Action;

(e) Whether or not plaintiff was permitted to present evidence on his own behalf at the hearings alleged

in paragraph X, lines 13-16, page 4 of the First Cause of Action;

(f) Whether or not plaintiff was given the opportunity to confront and cross-examine his accusers at the hearings alleged at paragraph X, lines 13-16, page 4 of the First Cause of Action;

(g) Whether or not plaintiff was given the opportunity to confront and cross-examine adverse witnesses at the hearings alleged at paragraph X, lines 13-16, page 4 of the First Cause of Action;

(h) Whether or not each individually named defendant is alleged to have done the acts set forth in the First Cause of Action in his individual capacity or in his capacity as an agent of defendant Local 150;

(i) The meaning of the word "Teamster" as that word is used in paragraph XII, line 1, page 5 of the First Cause of Action;

(j) Whether or not plaintiff is alleging that membership in defendant Local 150 is a condition precedent to employment as a "Teamster".

(5) It cannot be ascertained from the First Cause of Action whether the Constitution or By-laws of defendant Local 150 referred to in paragraph VIII, line 2, page 4 of the First Cause of Action are written or oral.

II.

These demurring defendants, and each of them, demur to the Second Cause of Action in the Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Second Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Second Cause of Action.



III.

These demurring defendants, and each of them, demur to the Third Cause of Action in the Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Third Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and Incorporate the grounds set forth therein in their demurrer to the Third Cause of Action.

IV.

These demurring defendants, and each of them, demur to the Fourth Cause of Action in the Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Fourth Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Fourth Cause of Action.

V.

These demurring defendants, and each of them, demur to the Fifth Cause of Action in the Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Fifth Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Fifth Cause of Action.

(2) In addition to the grounds for demurrer set forth above, these demurring defendants demur to the Fifth Cause of Action on the grounds that said cause of action is uncertain in the following additional respects:

(a) Whether or not Kaiser Engineers to which reference is made in paragraph II, line 32, page 9 of the Fifth Cause of Action is an "employer" engaged in "commerce" or in an industry "affecting commerce" within the meaning of those terms as used in the National Labor Relations Act;

(b) Whether or not Kuckenberg Construction Company to which reference is made in paragraph II, line 4, page 10 of the Fifth Cause of Action is an "employer" engaged in "commerce" or in an industry "affecting commerce" within the meaning of those terms as used in the National Labor Relations Act;

(c) Whether or not American River Constructors to which reference is made in paragraph II, line 7, page 10 of the Fifth Cause of Action is an "employer" engaged in "commerce" or in an industry "affecting commerce" within the meaning of those terms as used in the National Labor Relations Act;

(d) Whether or not McKeown Trucking Company to which reference is made in paragraph II, line 15, page 10 of the Fifth Cause of Action is an "employer" engaged in "commerce" or an industry "affecting commerce" within the meaning of those terms used in the National Labor Relations Act;

(e) Whether or not Wendt Construction Company to which reference is made in paragraph II, lines 20-21, page 10 of the Fifth Cause of Action is an "employer" engaged in "commerce" or in an industry "affecting commerce" within the meaning of those terms as used in the National Labor Relations Act.



WHEREFORE, these demurring defendants pray that:

1. This demurrer be sustained;
2. Plaintiff take nothing by his Complaint;
3. Defendant have judgment for his costs of suit;
4. Other relief be granted that the Court considers proper.

Dated: August 6, 1969.

LE PROHN & LE PROHN
By ROBERT LE PROHN
Robert Le Prohn

## *Appendix C*

FILED
Feb 7 1972
W. N. Durley, Clerk
By H. Rush, Deputy

LE PROHN & LE PROHN
315 Montgomery Street
San Francisco, California 94104
Tel: (415) 981-0430
Attorneys for Defendants.

*Superior Court of the State of California*
*County of Sacramento*

| | |
|---|---|
| Kenneth W. Sherrod, Plaintiff, vs. Chauffeurs, Teamsters and Helpers Local Union No. 150, of Sacramento, California, Joint Council of Teamsters No. 38, a Joint Council of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Carl J. Olsen, George M. LaBrasca, Richard Henry, Howard Yaeger, et al. Defendants. | No. 175 600 |

DEMURRER TO FIRST AMENDED COMPLAINT

I.

Defendants CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 150; JOINT COUNCIL OF TEAMSTERS NO. 38; CARL J. OLSEN; GEORGE M. LABRASCA; RICHARD HENRY and HOWARD YAEGER demur to the First Cause of Action in the Amended Complaint in this action on each of the following grounds:



(1) The Court has no jurisdiction of the subject matter of the First Cause of Action in that the subject matter of said cause of action has been preempted by Federal labor law.

(2) The First Cause of Action is uncertain in that it cannot be ascertained therefrom:

(a) Whether or not it is contended that defendant LaBrasca was a member of the Executive Board of Local 150;

(b) Whether or not George Overton was present at the hearing held May 6, 1966, and if not what is meant by the term "available for testimony" as used at lines 19 and 20, page 5, of the Amended Complaint.

(c) Whether or not plaintiff requested and was refused the opportunity to have George Overton appear at another time to offer testimony.

(d) Whether or not it is alleged that further evidence was presented at the hearing on May 18, 1966.

(e) Whether or not it is alleged that defendant LaBrasca was present at the hearing held on May 18, 1966.

(f) Whether or not it is alleged that defendants, or any of them, are responsible for George Overton not being present at the hearing on May 16, 1966.

(g) Whether or not it is alleged that since 1959 plaintiff has worked only for employers who were members of the Associated General Contractors Association.

(h) Whether or not it is alleged that plaintiff has sought employment only from employers who were members of the Associated General Contractors Association.

(i) Whether or not it is alleged that employers had a right to reject plaintiff for employment even if defendant Local 150 refused him membership.

II.

These demurring defendants, and each of them, demur to the Second Cause of Action in the Amended Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Second Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Second Cause of Action.

III.

These demurring defendants, and each of them, demur to the Third Cause of Action in the Amended Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Third Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Third Cause of Action.

IV.

These demurring defendants, and each of them, demur to the Fourth Cause of Action in the Amended Complaint in this action on the following grounds:

(1) These demurring defendants demur to the Fourth Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Fourth Cause of Action.

V.

These demurring defendants, and each of them, demur to the Fifth Cause of Action in the Amended Complaint in this action on the following grounds:



(1) These demurring defendants demur to the Fifth Cause of Action on each of the grounds heretofore set forth with respect to the First Cause of Action and incorporate the grounds set forth therein in their demurrer to the Fifth Cause of Action.

WHEREFORE, These demurring defendants pray that:

1. This demurrer be sustained.
2. Plaintiff take nothing by his Complaint.
3. Defendant have judgment for his costs of suit;
4. Other relief be granted that the Court considers proper.

Dated: December 9, 1971.

LE PROHN & LE PROHN
By ROBERT LE PROHN
Robert Le Prohn

## *Appendix D*

FILED
Apr 6, 1972
W. N. Durley, Clerk
By Mrrocmf, Deputy

JOHN C. WEIDMAN
325 Main Street
Placerville, California 95667
Telephone: (916) 622-5260
Attorney for Plaintiff

*In the Superior Court of the State of California*
*in and for the County of Sacramento*

| | |
|---|---|
| Kenneth W. Sherrod, Plaintiff, vs. Chauffeurs, Teamsters and Helpers Local Union No. 150, et al. Defendants. | No. 175 600 |

ORDER OVERRULING DEMURRER TO FIRST AMENDED COMPLAINT

The demurrer of defendants to the First Amended Complaint in the above-entitled action came on regularly to be heard on March 23, 1972. JOHN C. WEIDMAN appeared as counsel for plaintiff and defendants did not appear in person or by counsel. After hearing, said demurrer was submitted to the Court for a ruling and by the Court taken under advisement, and the Court now having given due consideration to said matters, and good cause appearing therefor,



IT IS ORDERED that defendant's Demurrer to First Amended Complaint be, and is hereby overruled, and defendants are hereby granted twenty (20) days, after notice, in which to answer.

Dated: April 6, 1972.

Oscar A. Kistle
Judge of the Superior Court

## *Appendix E*

*Superior Court of the State of California*
*in and for the*
*County of Sacramento*

Date: June 14, 1973. Court met at ..... Department No. 10. Present Hon. Frank G. Finnegan, Judge. H. Allenbach, Deputy Clerk. ..... Reporter P. Falge, Bailiff.

| | |
|---|---|
| Kenneth W. Sherrod<br>vs.<br>Chauffeurs, Teamsters, et al | Counsel:<br>John Weidman &<br>G. Dana Hobart<br>Robert LeProhn<br>(Underline Counsel Present) |

Nature of proceedings: Motion for new trial

COURT'S DECISION ON SUBMITTED MATTER

The Motion for New Trial is Denied.

There is no question in my mind from my research that this court has jurisdiction and the right to award relief in this action, as pointed out in the Gonzales case and others. Although the complaint does not in words allege "Outrageous conduct", the facts alleged and proved could well amount to that and without question the jury so found under the instructions.

While I probably would not have awarded either as much actual or exemplary damages, I am not at all shocked or offended by the jury's award, and I think the argument of



counsel before the jury was much more restrained than mine would have been had I been the lawyer.

I regret that the last brief was not filed on this motion until June 12, so with my trial calendar and other prior commitments I did not have what I consider adequate time to review the matter.

Frank G. Finnegan
Judge Superior Court

cc: John Weidman
Robert LeProhn

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This minute order was duly entered in R A and a copy placed in the file. Attest: W. N. Durley, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Sacramento.

County Clerk M.O. 4. Action 175600. By H. Allenbach, Deputy.

## *Appendix F*

ROBERT LE PROHN LAW CORPORATION
315 Montgomery Street
San Francisco, California 94104
Tel: (415) 981-0430
Attorneys for Defendants.

*Superior Court of the State of California*
*County of Sacramento*

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|---|---|
| Kenneth W. Sherrod, Plaintiff, vs. Chauffeurs, Teamsters & Helpers Local Union No. 150, Joint Council of Teamsters No. 38, Carl J. Olsen, George M. La Brasca, Richard Henry and Howard Yeager, Defendants. | No. 175 600 |

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS FOR NEW TRIAL

III. ERRORS IN LAW.

(A) The Court Erred in Instructing the Jury Regarding Punitive Damages.

The evidence presented in this case by plaintiff sought to establish two basic areas of misconduct by defendants: First, the evidence that defendant LaBrasca caused the termination of plaintiff's employment by Kukenberg Construction Co; evidence that this conduct was followed by defendant Local 150's wrongful refusal to process plaintiff's grievance to arbitration. There is no evidence that defendant Joint Council 38 was involved in this course of conduct.



Second, that plaintiff was wrongfully expelled by defendant Local 150 and that defendant Joint Council 38 wrongfully failed to reinstate him.

The appropriate body of law spelling out plaintiff's rights is found in the cases dealing with a union's duty of fair representation and in the cases which have developed the standards spelling out a member's rights *vis-a-vis* his union in an expulsion case. It is this body of law which enunciates plaintiff's substantive rights and not general tort law. The court erred in permitting plaintiff to treat this case as a standard brand tort action.

(1) Breach of Duty of Fair Representation.

A members claim against his union for intentional discrimination or invidious conduct against him involves a federal right. [*Vaca v. Sipes,* 386 US 171; *Ford Motor Co. v. Huffman,* 345 US 330; *Steele v. Louisville N.R.R.* 323 US 192, 198-199; *Richardson v. Communication Workers* (8th Cir. 1971) F(2) , 77 LRRM 2566]

Punitive damages are not recoverable for a breach of duty of fair representation. [*Williams v. Pacific Maritime Ass'n.* (9th Cir. 1970) 421 F(2) 1287] The court in *Williams* went on to state that Congressional policy regarding the duty of fair representation was intended to be controlling and preempted state law to the contrary. [421 F(2) 1287, 1289]. The state law rejected in *Williams* was California law.

Thus the court erred in giving the following instruction requested by plaintiff.

(a) Punitive Damages—Recovery of and Measure. If you find that plaintiff has suffered actual damage as a proximate result of the acts of defendants on which you base your finding of liability, you may in your sole discretion award additional damage against defendants, known as punitive or exemplary damages, for sake of example and by way of punishing defendants, if, and only if, you find by a preponderance of the evidence that said defendants have been guilty of oppression or actual malice.

["Malice" means a motive and willingness to ves, harrass, annoy, or injure another person. Malice may be shown by direct evidence of declarations of hatred or ill will or it may be inferred from acts and conduct, such as by showing that the defendants' conduct was wilful, intentional, and done in reckless disregard of its possible results.]

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

(b) In assessing punitive damages, if any, you may consider the character of the defendants' acts,